Supreme Court, U.S.
FILED
DEC 10 2010
OFFICE OF THE CLERK

No. 10-328

In the Supreme Court of the United States

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
BETH S. BRINKMANN
Deputy Assistant Attorney General
MARK B. STERN
DANA J. MARTIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the en banc court of appeals erred in unanimously affirming the dismissal of petitioners' claim for injunctive and declaratory relief based on asserted defamation by unidentified government officials concerning the 1998 bombing of a pharmaceutical plant in the Sudan by U.S. cruise missiles.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Baker v. *Carr*, 369 U.S. 186 (1962) 8, 9, 10, 16
Bond v. *United States*, 2 Ct. Cl. 529 (1866) 15
Boumediene v. *Bush*, 553 U.S. 723 (2008) 13
Chai v. *Department of State*, 466 F.3d 125 (D.C. Cir. 2006), cert. denied, 551 U.S. 1145 (2007) 12
Community for Creative Non-Violence v. *Pierce*, 814 F.2d 663 (D.C. Cir. 1987) 18
El-Shifa Pharm. Indus. v. *United States*, 378 F.3d 1346 (Fed. Cir. 2004), cert. denied, 545 U.S. 1139 (2005) 3, 10, 13, 14
Expeditions Unlimited Aquatic Enters., Inc. v. *Smithsonian Inst.*, 566 F.2d 289 (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978) 18
Hamdi v. *Rumsfeld*, 542 U.S. 507 (2004) 3, 13, 14, 15
Harrison v. *United States*, 6 Ct. Cl. 323 (1870) 15
Hill v. *United States*, 8 Ct. Cl. 470 (1872) 15
Holy Land Found. for Relief and Development v. *Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003), cert. denied, 540 U.S. 1218 (2004) 12
Hutchinson v. *Proxmire*, 443 U.S. 111 (1979)1 15

Cases—Continued: Page

Idris v. *Department of Treasury Office of Foreign Asset Control*, No. 1:99-cv-00472 (D.D.C. May 5, 1999) 12

Japan Whaling Ass'n v. *American Cetacean Soc'y*, 478 U.S. 221 (1986) 9

Joint Anti-Fascist Refugee Comm. v. *McGrath*, 341 U.S. 123 (1951) 17

La Plante v. *United States*, 6 Ct. Cl. 311 (1870) 15

Rasul v. *Bush*, 542 U.S. 466 (2004) 3, 13

Sanchez-Espinoza v. *Reagan*, 770 F.2d 202 (D.C. Cir. 1985) 18

Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 7

United States v. *Munoz-Flores*, 495 U.S. 385 (1990) 8

Wisniewski v. *United States*, 353 U.S. 901 (1957) 15

Constitution, statutes and rule:

U.S. Const.:

Art. I, Sec. 6, Cl. 1 (Speech or Debate Clause) 15

Art. II, Sec. 9, Cl. 2 (Suspension Clause) 13

Administrative Procedure Act:

5 U.S.C. 702(1) 18

5 U.S.C. 702(2) 16

5 U.S.C. 704 16

5 U.S.C. 706 16

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 12

Statutes and rule—Continued: Page

Federal Tort Claims Act:
28 U.S.C. 2674 4
28 U.S.C. 2680(a) 17
28 U.S.C. 2860(h) 17
International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* 12
8 U.S.C. 1189 12
28 U.S.C. 1346(b) 4
Fed. R. App. P. 59(e) 5

Miscellaneous:

Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 Pub. Papers 1464 (Aug. 21, 1998) 2

In the Supreme Court of the United States

No. 10-328

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-48a) is reported at 607 F.3d 836. The panel opinion of the court of appeals (Pet. App. 49a-76a) is reported at 559 F.3d 578. The district court's memorandum opinion dismissing the complaint (Pet. App. 84a-99a) is reported at 402 F. Supp. 2d 267. The district court's memorandum order denying petitioners' motion to alter judgment (Pet. App. 77a-82a) is unreported but is available at 2007 WL 950082.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2010. The petition for a writ of certiorari was

filed on September 7, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 7, 1998, a terrorist network headed by Osama bin Laden bombed the United States embassies in Kenya and Tanzania. Pet. App. 2a. On August 20, 1998, cruise missiles fired by the United States destroyed an industrial plant located in North Khartoum, Sudan. *Id.* at 104a ¶ 1, 109a ¶ 21. According to the complaint, that plant was owned by petitioner El-Shifa Pharmaceutical Industries Company (El-Shifa), which in turn was principally owned by petitioner Salah El Din Ahmed Mohammed Idris. *Id.* at 105a ¶¶ 2-3.

President Clinton announced that he had ordered the strike because the facility was "associated with the bin Ladin network" and was "involved in the production of materials for chemical weapons." Pet. App. 3a. The President explained that "[o]ur target was terror; our mission was clear: to strike at the network of radical groups affiliated with and funded by Usama bin Ladin, perhaps the preeminent organizer and financier of international terrorism in the world today." *Ibid.* "In a letter to Congress 'consistent with the War Powers Resolution,' the President reported that the strikes 'were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities' and 'were intended to prevent and deter additional attacks by a clearly identified terrorist threat.'" *Ibid.* (quoting Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 Pub. Papers 1464, 1464 (Aug. 21, 1998)). In a radio address the next day, the President explained that "our goal was to destroy, in

Sudan, the factory with which bin Ladin's network is associated, which was producing an ingredient essential for nerve gas." *Id.* at 3a-4a.

2. Petitioners first filed suit against the United States in the Court of Federal Claims (CFC), alleging that the destruction of the El-Shifa plant amounted to a compensable taking and seeking $50 million in damages. Pet. App. 6a. The CFC dismissed the case and the Federal Circuit affirmed, holding that petitioners' suit presented a nonjusticiable political question and explaining that the court could not properly review the President's determination that the El-Shifa plant was enemy property. *El-Shifa Pharm. Indus. Co.* v. *United States*, 378 F.3d 1346, 1365-1366 (2004). The court held that "where the President's own assessment of the offensive posture of the Nation's enemies overseas leads him to conclude that the Nation is at risk of imminent attack, we cannot find in the Constitution any support for judicial supervision over the process" by which the President determines that a particular military target is appropriate. *Id.* at 1366. The Federal Circuit rejected petitioners' contention that this Court's recent decisions in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), and *Rasul* v. *Bush*, 542 U.S. 466 (2004), supported their claim. *El-Shifa Pharm. Indus.*, 378 F.3d at 1369. This Court denied certiorari. See 545 U.S. 1139 (2005).

3. a. In April 2001, while the CFC suit was pending, petitioners filed this action against the United States, alleging that the destruction of the El-Shifa plant was not justified and seeking damages and declaratory and injunctive relief. Pet. App. 104a-140a. Petitioners alleged that "[t]here was no factual warrant for selecting the Plant for destruction," and that the plant had no connection "to bin Laden or to terrorism." *Id.* at 110a

¶ 24. They challenged the reliability of the evidence cited by the United States to support the assertion that the plant was a chemical weapons facility, and faulted the way intelligence information was gathered and analyzed. *Id.* at 113a-115a ¶¶ 30-33, 117a-118a ¶¶ 39-42, 130a-131a ¶¶ 78-82. Petitioners further alleged that "U.S. officials" "invent[ed] new justifications" for the strike by publicly depicting El-Shifa's owner, petitioner Idris, "as an associate of Osama bin Laden and international terrorist organizations." *Id.* at 125a-127a ¶¶ 64 and 66.

Counts One and Two of the complaint asserted claims for damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2674. Pet. App. 133a-135a ¶¶ 88-100. Count Three alleged that petitioners were defamed by statements to the press made by "[t]he President and other senior officials of the United States." *Id.* at 136a ¶ 102. Count Four asserted that the destruction of the El-Shifa plant and the failure to compensate petitioners for that loss violated the law of nations. *Id.* at 137a-139a ¶¶ 108-116. The complaint sought damages, a "declaration that claims made by agents of the United States that [petitioners] are connected to Osama bin Laden, terrorist groups or the production of chemical weapons are false and defamatory," an order requiring the United States to issue a press release retracting those statements, and a declaration that "the United States attack on the El-Shifa pharmaceutical plant violated the law of nations." *Id.* at 139a ¶¶ 1-4.

b. The district court granted the government's motion to dismiss. The court concluded that petitioners' claims under the FTCA were barred by the statute's discretionary function exception, Pet. App. 91a, and

found no waiver of sovereign immunity for petitioners' defamation or law-of-nations claims, *id.* at 91a-92a. The district court further concluded that petitioners' claims "likely present a nonjusticiable political question over which the court would lack jurisdiction." *Id.* at 99a. The court then denied petitioners' motion to alter its judgment under Federal Rule of Civil Procedure 59(e). *Id.* at 77a-82a.

4. In a divided opinion, the court of appeals affirmed.[1] Pet. App. 49a-76a. The panel majority held that the case was properly dismissed because it "presents a nonjusticiable political question." *Id.* at 50a. Judge Ginsburg concurred in the judgment in part and dissented in part. *Id.* at 61a-76a. With respect to the defamation claim, Judge Ginsburg would have reversed because, in his view, further factual development was necessary to determine whether the defamation claim presents a nonjusticiable political question. *Id.* at 65a-74a. The panel's decision was vacated when the court of appeals granted rehearing en banc. *Id.* at 100a-101a.

5. On rehearing en banc, the court of appeals unanimously affirmed the district court's dismissal of petitioners' suit. Pet. App. 1a-48a.

a. In his opinion for the court, Judge Griffith, joined by four other judges, held that petitioners' claims were foreclosed because they raise nonjusticiable political questions. Pet. App. 2a-30a. The court recognized that although disputes "involving foreign relations * * * are 'quintessential sources of political questions,'" "'it is error to suppose that every case or controversy which

---

[1] Petitioners did not pursue their FTCA claims on appeal. Petitioners did pursue their law-of-nations claim on appeal, but do not seek this Court's review on that claim. Pet. 7-8 n.2.

touches foreign relations lies beyond judicial cognizance.'" *Id.* at 10a (citation omitted).

As relevant here, the court concluded that adjudicating the defamation claim would require it "to determine the factual validity of the government's stated reasons for the strike," but that the political question doctrine precludes the courts from assessing "the merits of the President's decision to launch an attack on a foreign target." Pet. App. 16a. The court rejected petitioners' argument that "even if the political question doctrine bars review of the President's initial justifications for the attack, the court may nevertheless judge the veracity of subsequent justifications" by other government officials. *Id.* at 21a-22a. As the court explained, the factual premise of that argument is flawed because, based on its reading of the complaint, the later justifications "are fundamentally the same as the initial justifications" and, thus, "the veracity of the allegedly defamatory statements is 'inextricably intertwined' * * * with the merits of the actual justifications for the attack." *Id.* at 22a, 25a (citation omitted); *id.* at 30a (concluding that adjudicating petitioners' defamation claim would permit a "foreign target of a military strike" to "challenge the wisdom of retaliatory military action taken by the United States").

The court also rejected petitioners' reliance on cases involving military detention and the seizure of enemy property because there, unlike here, "the Constitution specifically contemplates a judicial role." Pet. App. 25a-26a. Finally, the majority would not have found petitioners' claims "so unsound as to warrant dismissal" on jurisdictional grounds, as the concurring judges did (p. 7, *infra*), but it recognized that "[p]erhaps the district court would have dismissed [petitioners'] claims for fail-

ure to state a claim * * * had the case proceeded to the merits." Pet. App. 29a.

b. Judge Kavanaugh, joined by three other judges, concurred in the judgment on the ground that petitioners' claims are "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." Pet. App. 34a (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)). The concurring opinion concluded that no cause of action for defamation was available against the United States because Congress had not created a federal statutory cause of action, the Court had not recognized a federal common law cause of action, and the Administrative Procedure Act (APA) did not provide or incorporate such a federal or state law cause of action. *Id.* at 35a-37a.

The concurring judges, however, rejected the court's political question analysis. Pet. App. 30a-33a, 39a-48a. Judge Ginsburg, joined by Judge Rogers, disagreed with the proposition that the political question doctrine is triggered when the plaintiff's claim calls into question or requires a court to reassess a decision or action constitutionally committed to the Executive, in the absence of some further inquiry into what the court would decide. *Id.* at 31a. Judge Kavanaugh, joined by Chief Judge Sentelle, asserted that the political question doctrine should not apply to cases involving alleged statutory violations; rather, in such cases, the inquiry should be whether the legislation infringes on the President's Article II powers. *Id.* at 40a-41a. Judge Kavanaugh concluded, however, that "Congress has not created any cognizable cause of action that would apply to President Clinton's decision to bomb El-Shifa or later Executive Branch statements about the bombing." *Id.* at 47a.

Judge Kavanaugh therefore further concluded that because the Article II and political question issues have "an abstract and hypothetical air to them," the court should decline to address the scope of the President's Article II powers or rely on the political question doctrine. *Id.* at 48a.

ARGUMENT

Petitioners ask this Court to grant review in a case that the en banc court of appeals unanimously agreed was properly dismissed at the threshold. The majority deemed the case nonjusticiable because it would require adjudication of a political question; the other judges concurred on the ground that petitioners' claims were so insubstantial as to deprive the court of jurisdiction. The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners' disagreement with the court's political question ruling is largely factbound; the ruling is consistent with the Federal Circuit's decision in a related case involving the same petitioners, in which this Court denied certiorari; and the reasoning set forth by the concurring judges would provide an alternative ground for affirmance. Further review is therefore unwarranted.

1. The political question doctrine is "primarily a function of the separation of powers," *Baker* v. *Carr*, 369 U.S. 186, 210 (1962), and "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States* v. *Munoz-Flores*, 495 U.S. 385, 394 (1990). It thus "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive

Branch." *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

In *Baker*, this Court identified six characteristics "[p]rominent on the surface of any case held to involve a political question":

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217. To determine whether "one of these formulations" is applicable, the court must engage in a "discriminating inquiry into the precise facts and posture of the particular case." *Ibid.* As the court of appeals recognized (Pet. App. 10a-11a), although foreign and military affairs feature prominently among the areas in which the political question doctrine traditionally has been implicated, not "every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211.

The en banc court of appeals correctly concluded that petitioners' defamation claim cannot be adjudicated without implicating the separation of powers concerns reflected in the political question doctrine, and that petitioners cannot obtain the extraordinary relief sought in their complaint, including an order requiring retraction

of statements made by the "President and other senior officials" about the need for the military strike and whether there is a connection between petitioners and terrorism or chemical weapons. See Pet. App. 136a-137a ¶¶ 102 and 107, 139a ¶¶ 2-3.

Petitioners do not dispute that a court could not determine the reasons for the 1998 air strike without trenching on the conduct of the military and on foreign policy. See *El-Shifa Pharm. Indus. Co.* v. *United States*, 378 F.3d 1346, 1366 (Fed. Cir. 2004) ("[W]here the President's own assessment of the offensive posture of the Nation's enemies overseas leads him to conclude that the Nation is at risk of imminent attack, we cannot find in the Constitution any support for judicial supervision over the process" by which the President determines to destroy a particular target.), cert. denied, 545 U.S. 1139 (2005). Nor do they suggest that a court could delve into the President's justifications for the air strike without creating the "potentiality of embarrassment from multifarious pronouncements by various departments on one question," or by second-guessing "policy determination[s] of a kind clearly for nonjudicial discretion," thus reflecting a "lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217; see Pet. C.A. En Banc Br. 16 n.2 (Petitioners "do not premise the defamation claim on the President's statements.").

Petitioners instead focus (Pet. 4-6, 16) almost exclusively on later and allegedly different justifications for the strike attributed to unnamed government officials cited in press reports. As petitioners recognize (Pet. 16 n.4), however, the court of appeals rejected the factual premise underlying their argument. After analyzing the allegations in the complaint, the court concluded that

the supposedly new justifications were "fundamentally the same as the initial justifications" articulated by the President and that "[t]he allegedly defamatory statements cannot be severed from the initial justifications for the attack." *Id.* at 22a; see *id.* at 22a-25a (detailed analysis of complaint's factual allegations). Because the challenged statements, "[a]t most, * * * elaborate upon the nature of the connection between the plant and bin Laden" – a connection that the President made on the day of the attack and asserted as a basis for the military action—evaluating the truth or falsity of the later statements would require the court to evaluate the truth of the President's original account of the attack. *Id.* at 23a. In these circumstances, the court of appeals correctly concluded: "Under the political question doctrine, the foreign target of a military strike cannot challenge in court the wisdom of retaliatory military action taken by the United States. Despite their efforts to characterize the case differently, that is just what [petitioners] have asked us to do." *Id.* at 30a.

The court of appeals did not, as petitioners suggest, conclude that the political question doctrine bars all claims involving "allegations offered in justification of" any and all "national-security decisions." Pet. 25. Nor did the court hold that the political question doctrine renders nonjusticiable any case in which resolution on the merits might "'reflect adversely upon a decision constitutionally committed to the President,'" or require consideration of "a justification for a prior military, national-security, or foreign-policy decision." Pet. 24, 25 (quoting Pet. App. 32a). The court of appeals closely analyzed the particular defamation claim advanced in this lawsuit and found it barred by the political question doctrine because it could not be adjudicated without

making a judicial finding as to whether the United States' military strike against the El-Shifa plant was factually justified. Pet. App. 20a (resolving defamation claim "would require the court to reconsider the merits of the decision to strike the El-Shifa plant by determining whether the government's justifications for the attack were false"). That case-specific holding does not warrant further review.[2]

---

[2] Petitioners suggest (Pet. 16) that the court of appeals found the "subsequent designation of [petitioner] Idris as a supporter of terrorism" to be nonjusticiable. Congress has established mechanisms through which a person or entity may be "designated" as a terrorist by the Executive Branch, but no such designation is at issue here. Under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, for example, the Secretary of State may designate an entity as a "foreign terrorist organization" (FTO) by issuing a formal order after making specified findings. See 8 U.S.C. 1189; *Chai* v. *Department of State*, 466 F.3d 125, 126-127 (D.C. Cir. 2006), cert. denied, 551 U.S. 1145 (2007). Such a designation is made reviewable by statute and has direct legal consequences, as it requires financial institutions to freeze an FTO's accounts, renders the organization's representatives ineligible for visas, and makes it a crime to knowingly provide material support to the FTO. See *id.* at 127-128. Similarly, pursuant to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, the President has issued Executive Orders authorizing the Department of the Treasury to block assets of "Specially Designated Terrorists" and "Specially Designated Global Terrorists," which are formal designations with concrete consequences that are subject to review under the APA. See generally *Holy Land Found. for Relief and Dev.* v. *Ashcroft*, 333 F.3d 156, 159-160, 162 (D.C. Cir. 2003), cert. denied, 540 U.S. 1218 (2004). Invoking the IEEPA, petitioner Idris filed suit in 1999 to have the Department of the Treasury lift orders freezing his assets. That case was dismissed after the Department of the Treasury unblocked the accounts at issue. See *Idris* v. *Department of Treasury Office of Foreign Asset Control*, No. 1:99-cv-00472 (D.D.C. May 5, 1999). The court of appeals' decision below neither holds nor suggests that these distinct formal designations

2. a. As they did when seeking review in this Court of the Federal Circuit's decision in *El-Shifa Pharmaceuticals Industries Co.* v. *United States* (No. 04-1291 Pet. 6-8), petitioners contend (Pet. 16-19) that this Court's review is needed because the court of appeals' decision "directly and irreconcilably conflicts" with the Court's decisions involving military detention—*Boumediene* v. *Bush*, 553 U.S. 723 (2008), *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), and *Rasul* v. *Bush*, 542 U.S. 466 (2004). That argument lacks merit.

Those cases held that judicial review was appropriate when individuals raised questions regarding the Executive Branch's power to hold them in custody. See *Boumediene*, 553 U.S. at 771 (under the Suspension Clause of the Constitution, privilege of habeas corpus applies to detainees at Guantanamo Bay unless the writ is formally suspended); *Hamdi*, 542 U.S. at 509, 531 (United States citizen could challenge factual basis for his detention; emphasizing "the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law"); *Rasul*, 542 U.S. at 470 (habeas statute provided federal courts with "jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base"). In those cases, the writ of habeas corpus, grounded in the Suspension Clause, furnished a specific basis for judicial involvement. See Pet. App. 25a-26a.

In the instant case, petitioners are not in the custody of the United States. They are foreign nationals who

---

are insulated from all judicial review under the political question doctrine.

seek a declaration "that claims made by agents of the United States that [petitioners] are connected to Osama bin Laden, terrorist groups or the production of chemical weapons are false and defamatory," as well as an order requiring retraction of statements made by "officials of the United States government" about the need for the military strike and petitioners' connection to terrorism and chemical weapons. Pet. App. 139a ¶¶ 2-3; *id.* at 136a ¶ 102. Nothing in the military detention cases suggests that such a claim is properly cognizable in the courts.

The plurality in *Hamdi*, the case on which petitioners principally rely (Pet. 17-18), understood that, "[w]ithout doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." 542 U.S. at 531. Indeed, the plurality specifically observed that "initial captures on the battlefield need not receive the process [described in the opinion]; that process is due only when the determination is made to *continue* to hold those who have been seized." *Id.* at 534. Petitioners emphasize that, in *Hamdi*, the evidence supporting the legality of the continued detention pertained to the initial capture. The Court made clear, however, that it was not reviewing the initial decision to capture; it was reviewing the decision to retain the detainee in custody. *Id.* at 534-535. There is no comparable continuing conduct for a court to review here. Cf. *El-Shifa Pharm. Indus. Co.*, 378 F.3d at 1369 (concluding that petitioners' takings claim for the destruction of the El-Shifa plant presents "a fundamentally different set of facts" than those at issue in *Hamdi* and *Rasul*).

The plurality opinion in *Hamdi* does make clear that the constitutional and public interest in the President's vigorous conduct of military affairs will not invariably outweigh competing constitutional concerns. See 542 U.S. at 532-533. But "[t]his case involves no claim by [petitioners] of any constitutional right and no allegation that the President or any other officer exceeded his constitutional authority." Pet. 23. Just as the Court in *Hamdi* did not hold that the President's military decisions are always reviewable, the court of appeals in this case neither held nor suggested that such decisions are *never* subject to judicial scrutiny. As discussed above (see pp. 11-12, *supra*), the en banc court of appeals did not announce a broad, categorical rule; its holding is limited to the circumstances of this case.[3]

---

[3] Cases regarding the seizure of enemy property are likewise inapposite. See Pet. 18 n.5 (citing *Bond* v. *United States*, 2 Ct. Cl. 529 (1866); *Harrison* v. *United States*, 6 Ct. Cl. 323 (1870); *La Plante* v. *United States*, 6 Ct. Cl. 311 (1870); *Hill* v. *United States*, 8 Ct. Cl. 470 (1872)). Those cases involved the interpretation and application of statutes specifically providing for circumscribed judicial review of the statutorily authorized seizure of enemy property in times of war. See, *e.g.*, *Bond*, 2 Ct. Cl. at 529 (noting that relevant statutes "confer[red] very special and limited powers"). They in no way suggest that courts can or should review public justifications by Executive Branch officials for the President's exercise of his Article II authority as Commander in Chief to launch a military strike in exercise of the United States' inherent right of self-defense. See Gov't C.A. En Banc Br. 5. And petitioners here, unlike in the Court of Claims cases, do not rely on any statutory cause of action specifically providing for such review. See pp. 16-18 & n.4, *infra*. *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979), a case arising under the Speech or Debate Clause, is likewise inapposite. See Pet. 19 n.6. A Senator's republication of statements previously made on the Senate floor was not protected in *Hutchinson* because the Speech or Debate Clause protects statements only to the extent

b. Petitioners also rely (Pet. 19-24) on Judge Kavanaugh's concurring opinion, joined by one other judge, to argue that the political question doctrine is inapplicable in cases presenting statutory challenges to executive action. This Court's review is not warranted to resolve any disagreement among the judges on the en banc court of appeals. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

In his concurring opinion, Judge Kavanaugh posited that courts should not analyze cases involving statutory causes of action under the political question rubric, which is itself "a function of the separation of powers," *Baker*, 369 U.S. at 210, but instead should determine whether the relevant statute "infringes on the President's exclusive, preclusive authority under Article II of the Constitution." Pet. App. 40a. Judge Kavanaugh recognized, however, that this case presents no viable statutory challenge. *Id.* at 34a-39a. Accordingly, this case would be an exceedingly poor vehicle for deciding whether and to what extent a true statutory cause of action directed to the subject matter at issue presents a nonjusticiable political question.[4]

---

they are made as part of the legislative process or deliberation. 443 U.S. at 130-133.

[4] To the extent petitioners claim to have a viable statutory cause of action under the APA, Pet. 13 n.3, 23, Judge Kavanaugh plainly disagreed. See Pet. App. 37a n.1 (Petitioners "have not contended that the relevant agency actions were arbitrary and capricious under the APA."). Indeed, Section 706 of the APA is cited nowhere in the complaint or supplemental complaint. See Pet. App. 104a-143a. And, as Judge Kavanaugh's concurring opinion explained, any such claim "would face a variety of hurdles," "including 5 U.S.C. 701(a)(2), which exempts from APA review agency action that is committed to agency discretion by law," as well as 5 U.S.C. 704, which requires "final agency action." Pet. App. 37a n.1; see also 5 U.S.C. 702(2). As explained in the

3. This case is also a poor vehicle for review of the political question ruling more generally. The en banc court of appeals unanimously concluded that this case was properly dismissed, and the reasoning set forth by the concurring judges would provide an alternative ground for affirmance.

Four judges of the en banc court correctly concluded that petitioners' defamation claim was subject to dismissal at the threshold because it is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." Pet. App. 39a (citation omitted); cf. *id.* at 29a (en banc majority opinion) (disagreeing with jurisdictional dismissal but noting that petitioners' claims might be "of doubtful or questionable merit" and thus subject to dismissal for failure to state a claim).

Petitioners barely address this alternative ground for affirmance. The FTCA contains express exceptions for discretionary functions and defamation claims, 28 U.S.C. 2680(a) and (h), and in any event provides only for damages, not equitable relief. In a footnote, petitioners suggest (Pet. 12 n.3) that "numerous cases hold that the victim of a tort committed by a federal officer in his official capacity has a common-law claim for equitable relief against the United States." But the cases petitioners cite are inapposite. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951) (plurality), involved a suit against individual federal officers for unauthorized conduct and did not involve a claim against the United States. See *id.* at 135-136, 137-138. And, as Judge Kavanaugh concluded (Pet. App. 36a), neither

---

text, the FTCA exempts claims based on the exercise of a discretionary function and claims based on alleged defamatory conduct. See 28 U.S.C. 2680(a) and (h).

Community for Creative Non-Violence v. *Pierce*, 814 F.2d 663, 672 (D.C. Cir. 1987), nor *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution*, 566 F.2d 289, 294 n.16 (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978), held that there is a federal common-law cause of action for defamation against the United States. Petitioners' assertion of a statutory cause of action for defamation under the APA is likewise misconceived for the reasons set forth by Judge Kavanaugh. Pet. App. 36a-37a & n.1; see p. 16 n.4, *supra*. All else aside, this case, in which a declaratory judgment is sought at the behest of foreign nationals that a foreign military strike was unlawful, presents a compelling case for dismissal on equitable grounds. See *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 207-208 (D.C. Cir. 1985); 5 U.S.C. 702(1) (nothing in the APA's waiver of sovereign immunity "affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground").

These considerations provide an additional reason for the Court to deny review. See Pet. App. 48a ("Given that no cause of action exists here, the political question and Article II issues in this case have an abstract and hypothetical air to them.").

* * * * *

This case does not test the boundaries of the political question doctrine. "If the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target, and [petitioners] ask [the Court] to do just that." Pet. App. 16a. This Court denied a petition for a writ of certiorari seeking review of a related Fed-

eral Circuit decision in a case brought by the same petitioners, involving the same 1998 military strike, and dismissing the case on political question grounds. The same result is warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
BETH S. BRINKMANN
Deputy Assistant Attorney General
MARK B. STERN
DANA J. MARTIN
Attorneys

DECEMBER 2010